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Supreme Court of the United States

October Term, 1975
No. 75-111

BUILDERS ASSOCIATION OF SANTA CLARA—SANTA CRUZ COUNTIES, a California corporation, individually and for the benefit of its members, *Appellant,*

vs.

SUPERIOR COURT OF THE STATE OF CALIFORNIA FOR THE COUNTY OF SANTA CLARA, *Appellee,*

CITY OF SAN JOSE, a Chartered City, CITY COUNCIL OF SAN JOSE, NORMAN Y. MINETA, JOSEPH A. COLLA, JANET GREY HAYES, ROY B. NAYLOR, ALFREDO GARZA, JR., SUSAN WILSON and JAMES SELF, as members of the CITY COUNCIL OF SAN JOSE, *Real Parties in Interest.*

On Appeal From the Supreme Court of the State of California.

Appellant's Response to Motion to Dismiss Appeal or Affirm.

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SUBJECT INDEX

I

Page

The Ordinance Infringes the Fundamental Federally Protected Right to Travel and Appellants Have Standing to Raise That Issue 1

II

The Ordinance Causes a Denial of Equal Protection of the Laws 5

III

Real Parties' in Interest's Assertions Concerning Due Process Are Erroneous 6

Conclusion 7

TABLE OF AUTHORITIES CITED

Cases — Page

Barrows v. Jackson, 346 U.S. 249 (1953) 4

Brown v. Superior Court, 5 Cal.3d 509, 96 Cal. Rptr. 584, 487 P.2d 1224 (1971) 4

Construction Industry Association of Sonoma County v. The City of Petaluma, ... F.2d ...., Ninth Cir. No. 74-2100, slip op., August 13, 1975, at 5 .....3, 4

Drockton v. Board of Elections, 16 Ohio Misc. 211, 240 N.E.2d 896 (Ct.Com.Pl. 1968) 6

Edwards v. California, 314 U.S. 160 (1941) 2, 4, 5

Forest City Enterprises, Inc. v. City of Eastlake, 41 Ohio St. 2d 187, 324 N.E.2d 740 (1975) 6

NAACP v. Alabama, 357 U.S. 449 (1958) 5

Pierce v. Society of Sisters, 268 U.S. 510 (1925) .. 4

Shapiro v. Thompson, 394 U.S. 618 (1969) 5

Taschner v. City Council, 31 Cal.App.3d 48, 107 Cal.Rptr. 214 (1973) 4

Warth v. Seldin, ... U.S. ...., 45 L.Ed. 343 (1975) 3, 5

Ybarra v. City of Town of Los Altos Hills, 503 F. 2d 250 (9th Cir. 1974) 3

Miscellaneous

6 U.S. Bureau of the Census, 1970 Census of Population, Table 50 2

Statute

Code of Civil Procedure, Sec. 1086 4

Textbooks — Page

Deutsch, "Land Use Growth Controls: A Case Study of San Jose and Livermore, California", 15 Santa Clara Lawyer (1974), pp. 1, 3, 11 2

Morrison, San Jose and St. Louis in the 1960's: A Case Study of Changing Urban Population (Rand Corp. 1973), p. 15 2

Stanford Environmental Law Society, "Argument in Favor of Measure B", A Handbook for Controlling Local Growth (1973), p. 107 .....5, 6

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Real Parties in Interest.

On Appeal From the Supreme Court of the State of California.

Appellant's Response to Motion to Dismiss Appeal or Affirm.

I

The Ordinance Infringes the Fundamental Federally Protected Right to Travel and Appellants Have Standing to Raise That Issue.

There is no "more certain" boundary to the permissible area of state legislative activity "than the prohibition against attempts on the part of any single state to isolate itself from difficulties common to all of them by restraining the transportation of persons and prop-

erty across its borders." *Edwards v. California,* 314 U.S. 160, 173 (1941).

In *Edwards,* this Court held that California could not remedy a "grave and perplexing social and economic dislocation" (314 U.S. at 173) by a statute excluding "indigent" migrants from other states. This case presents the issue of whether California may evade that principle by allowing municipalities to attempt to remedy their "grave and perplexing social and economic dislocations" by enacting anti-growth zoning ordinances which restrict the inflow of new residents.

The San Francisco Bay Area is one of the major industrial and population centers of the United States. It is the cite of one of the principal financial centers and one of the principal seaports of the western United States, of two major national universities and of hundreds of major industries engaged in national and international commerce. It has been and will continue to be a focal point for migration from within and without California. See: U.S. Bureau of the Census, *1970 Census of Population,* Vol. 6, Table 50; Morrison, *San Jose and St. Louis in the 1960's: A Case Study of Changing Urban Population,* 15 (Rand Corp. 1973); Deutsch, "Land Use Growth Controls: A Case Study of San Jose and Livermore, California", 15 Santa Clara Lawyer 1, 3, 11 (1974); Rptr. Tr. Oct. 18, 1973 at 43-44.

The decision below permits California cities to restrain migration into California as effectively as the California statute which this Court struck down in *Edwards.* For San Jose is not alone in restricting growth and immigration. Numerous other communities located in the Bay Area have either enacted or are actively

considering similar ordinances. See Jurisdictional Statement at 13-16. The Court of Appeals for the Ninth Circuit in (erroneously, we believe) upholding the Petaluma anti-growth ordinance, acknowledge that if similar ordinances "were to be adopted by municipalities throughout the region, the impact on the housing market would be substantial. For the decade 1970 to 1980, the shortfall in needed housing in the region would be about 105,000 units (or 25 percent of the units needed). Further, the aggregate effect of a proliferation of [such ordinances] throughout the San Francisco region would be a decline in the regional housing stock quality, a loss of the mobility of current and prospective residents and a deterioration in the quality and choice of housing available to income earners with real incomes of $14,000 per year or less." *Construction Industry Association of Sonoma County v. The City of Petaluma,* ..... F.2d ....., Ninth Cir. No. 74-2100, slip opinion, August 13, 1975, at 5. The same court also recently upheld a zoning ordinance of another San Francisco Bay Area city which prevented poor people from living in that city. *Ybarra v. City of Town of Los Altos Hills,* 503 F.2d 250, 253 (9th Cir. 1974).

It is apparent from the cases cited in the Jurisdictional Statement and this Response that the proliferation of anti-growth ordinances that the Court of Appeals treated as a speculative possibility is, in fact, an existing reality.

Real parties in interest do not speak to these issues. Rather, they seek to avoid the issues by a specious argument that appellants lack standing to raise them. The principal authorities upon which they rely, *Warth v. Seldin,* .... U.S. ...., 45 L.Ed. 343 (1975) and *Con-*

struction Industry Assn. of Sonoma County v. City of Petaluma, supra, pertain to standing to raise issues in cases originating in the federal district courts. This case originated in the Supreme Court of California by the filing of an original petition for writ of mandate pursuant to a statute which requires that such relief may be sought only by "the party beneficially interested." Calif. Code Civ. Proc. §1086; *Brown v. Superior Court,* 5 Cal.3d 509. 514, 96 Cal.Rptr. 584, 487 P.2d 1224 (1971); *Taschner v. City Council,* 31 Cal.App.3d 48, 55, 107 Cal.Rptr. 214 (1973). The California Supreme Court by issuing an alternative writ of mandate determined both that a writ of mandate was an appropriate remedy, and thus that petitioners were parties "beneficially interested," and that this case presents issues of great public importance. See decisions cited, Jurisdictional Statement at 9-10.

Nor is there any impediment to petitioners' raising the Constitutional issues of right to travel and equal protection even though petitioners are not the persons seeking to migrate into San Jose. In *Edwards v. California,* the appellant in this Court was not the person who had migrated into California, but the person who had transported him. This Court has long recognized that corporations whose beneficial interests will be iujured by the deprivation of the Constitutional rights of others may assert those Constitutional rights, *Pierce v. Society of Sisters,* 268 U.S. 510, 535 (1925), that a person who will suffer economic injury by the deprivation of another's Constitutional rights may assert those rights to defeat state action against him, *Barrows v. Jackson,* 346 U.S. 249, 257-60 (1953), and that an association may assert the Constitutional rights of its members which will be infringed by state

action, *NAACP v. Alabama,* 357 U.S. 449, 458-60 (1958). *Warth v. Seldin* expressly recognizes that an association "may have standing solely as the representative of its members" to seek injunctive and declaratory relief to prevent deprivation of Constitutional rights. 45 L.Ed.2d at 362.

II

The Ordinance Causes a Denial of Equal Protection of the Laws.

Real parties in interest obscure the substantial denial of equal protection of the laws caused by Measure B.

Measure B was candidly proposed as a benefit to the existing taxpayers and residents of San Jose. See "Argument in Favor of Measure B" reprinted in Stanford Environmental Law Society, *A Handbook for Controlling Local Growth,* 107 (1973).

Real parties in interest do not dispute that Measure B infringes on the right to travel, one of the fundamental rights of national citizenship, *Shapiro v. Thompson,* 394 U.S. 618, 629-31 (1969), *Edwards v. California, supra,* 314 U.S. at 178 (concurring opinion of Douglas, J.). Accordingly, they must demonstrate that a "compelling state interest" justifies Measure B, a showing which they have not even attempted.

But even if Measure B did not interfere with a fundamental right, the ordinance would still be a denial of equal protection. Measure B bears no rational relationship at all to any legitimate governmental interest. The ordinance does not discriminate on the basis of use of school or any other public facilities; it discriminates solely on the basis of the location of a particular parcel of land. A present resident whose family increases in size, or who builds a house on a parcel already zoned for

residential use, or who moves into an existing house, pays no additional exaction on account of the impact he and his family has on the local schools. Only the person purchasing a house built on land newly zoned for residential purposes pays such an exaction. As San Jose's own experts hired to conduct the study required by Measure B frankly concede, the result is to favor present residents at the expense of newcomers and persons of moderate and low income. *Measure B Study* at 19-21; Jurisdictional Statement at 20.

III

Real Parties' in Interest's Assertions Concerning Due Process Are Erroneous.

The assertion that courts of other states have reached the same conclusion on the due process and initiative issues as those reached by the California Supreme Court below (Motion to Dismiss Appeal or Affirm at 8-9) is based on an erroneous reading of *Drockton v. Board of Elections,* 16 Ohio Misc. 211, 240 N.E.2d 896, 900 (Ct.Com.Pl. 1968). That case was not decided on federal Constitutional grounds but solely on state statutory grounds. The inference which real parties in interest draw from *Drockton* is contrary to a later decision of the Ohio Supreme Court, *Forest City Enterprises, Inc. v. City of Eastlake,* 41 Ohio St. 2d 187, 324 N.E.2d 740 (1975), invalidating as violative of due process of law a city charter provision requiring approval by referendum of any ordinance changing an existing land use.

Conclusion.

Real parties in interest and the court below agree that this case deals with issues of substantial public importance. The resolution by the court below of those issues is contrary to prior decisions of this Court and if permitted to stand, will result in substantial impairment of fundamental federal Constitutional rights. The Motion to Dismiss Appeal or Affirm does not convincingly demonstrate to the contrary.

For all the foregoing reasons, this Court should deny the Motion to Dismiss Appeal or Affirm and note probable jurisdiction.

Respectfully submitted,

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